

**OFFICE OF ADMINISTRATIVE LAW**

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**SUSAN LAPSLEY**  
Director



2008 JUL 21 AM 10:35

Date: July 21, 2008

To: Byron Jackson

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 14(S)**  
**(CTU2008-0709-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum regarding  
"Management of Indecent Exposure Protocol"

On July 9, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum issued by the Department of Corrections and Rehabilitation (Department) on the subject "Management of Indecent Exposure Protocol" constitutes an underground regulation. The memorandum is dated April 6, 2007, and is marked "original signed by Teresa Schwartz for:" Lea Ann Chrones, Director (A), Division of Adult Institutions.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>1</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule that meets the definition of a "regulation" in Government Code section 11342.600<sup>2</sup> is required to be adopted pursuant to the APA. However, a rule that merely restates the law is not an underground regulation because it does not further implement, interpret, or make specific the law enforced or administered by the agency.<sup>3</sup>

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<sup>1</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

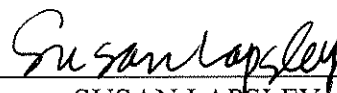
"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

<sup>2</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

<sup>3</sup> A challenged rule "contained in a regulation that has been adopted pursuant to the APA rulemaking provisions of the APA" is not an underground regulation pursuant to title 1, section 270(f)(2)(C).


The Department of Corrections and Rehabilitation has adopted a regulation specifying that "inmates whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU" (Security Housing Unit). (Cal. Code Regs., tit. 15, § 3341.5, subd. (c).) This regulation has been duly adopted by the Department and filed with the Secretary of State pursuant to the APA. Paragraph (9) of subdivision (c) of this regulation establishes a "SHU Term Assessment Chart" that fixes periods of confinement to SHU for specific offenses. Subparagraph (K) of paragraph (9) establishes a term of 3 months (low), 6 months (expected) or 9 months (high) in the SHU for the offense of Indecent Exposure. The April 6, 2007 memorandum regarding "Management of Indecent Exposure Protocol" simply repeats the periods of confinement established by section 3341.5(c)(9)(K) for the offense of Indecent Exposure. The wording in the challenged memorandum is a mere restatement of law and is therefore not an underground regulation.<sup>4</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



SUSAN LAPSLEY

Director

  
for Peggy J. Gibson  
Staff Counsel

Copy: Matthew Cate

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<sup>4</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
  - (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.**
  - (D) The challenged rule has expired by its own terms.
  - (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)